

Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In re
**DISTRIBUTION OF CABLE
ROYALTY FUNDS**

**CONSOLIDATED DOCKET NO.
14-CRB-0010-CD/SD
(2010-13)**

In re
**DISTRIBUTION OF SATELLITE
ROYALTY FUNDS**

**REPLY IN SUPPORT OF JOINT MOTION TO STRIKE MULTIGROUP CLAIMANTS’
PURPORTED WRITTEN DIRECT STATEMENT AND TO DISMISS MULTIGROUP
CLAIMANTS FROM THE DISTRIBUTION PHASE**

The Motion Picture Association of America, Inc. (“MPAA”) and the Settling Devotional Claimants (“SDC”) hereby submit their reply in support of their joint motion seeking to strike the purported Written Direct Statement filed by Multigroup Claimants (“MGC”) on December 29, 2017 (“MGC December 29 Filing”), and to dismiss MGC as a party from the Distribution Phase of the above-captioned consolidated proceeding (“Joint Motion”), which responds to MGC’s Opposition brief filed on January 17, 2018 (“MGC Opposition”). For all of the reasons set forth below, the Joint Motion should be granted.

I. MGC Concedes That It Submitted Arbitrary Claims Without Evidentiary Support, In Violation Of The Judges’ Regulations And Orders.

Not surprisingly, MGC makes no attempt to address MPAA and SDC’s argument that the MGC December 29 Filing failed to comply with Section 350.6(e)(3) of the Copyright Royalty Judges’ (“Judges”) regulations, which requires the contents of pleadings filed with the Judges to be “true and correct” and for all factual contentions to have evidentiary support. *See* 17 C.F.R. § 350.6(e)(3). Instead, MGC *concedes* that its claims for 100% of the Program Suppliers and Devotional category funds were arbitrary, and made *without* evidentiary support. *See* MGC

Opposition at 6 (“MC did not *expect* that the methodologies advocated by either SDC or MPAA would render an allocation of 100% of either the devotional or program suppliers category to MC.”). Indeed, MGC does not even purport to have an evidentiary basis for its bogus, made-up claims, admitting that it simply put in its 100% share claims in the MGC December 29 Filing as a placeholder. *See* MGC Opposition at 6-7, and 9.

MGC also fails to explain how it could assert claims to 100% of either the Program Suppliers or Devotional category funds *in good faith* following the issuance of the Judges’ October 23, 2017 *Ruling And Order Regarding Objections To Cable And Satellite Claims* (“Claims Order”). The Claims Order resolved all claims objections in this proceeding, and specifically denied MGC’s claims objections directed at MPAA and SDC while dismissing many MGC claimants and titles. Indeed, it is clear that following issuance of the Claims Order, MGC and its counsel, who signed the MGC Written Direct Statement, lack *any* good faith basis for its arbitrary 100% claims.

Rather than attempting to provide evidentiary support for its specious claims or to use the opposition as an opportunity to revise those claims now so that they comport with the actual percentage shares for MGC that were calculated by MPAA and SDC under their respective methodologies (which did incorporate the Claims Order), MGC doubles down. It argues that it should be permitted to submit arbitrary, placeholder percentage claims for 100% in its December 29 Filing because MPAA and SDC previously filed written direct statements seeking 100% of the Program Suppliers and Devotional category funds, either in this proceeding or past proceedings. *See* MGC Opposition at 4-5 and n.1 (referencing MPAA’s June 30, 2017 Written Direct Statements submitted in this proceeding, and SDC’s May 30, 2012 Written Direct Statement submitted in the 2000-2003 Cable Phase II proceeding). However, MGC fails to

acknowledge that, in both cases, MPAA and SDC had an evidentiary basis to seek disqualification of all of MGC's (or Independent Producers Group's ("IPG")) claims in the respective proceedings, and submitted their claims for 100% of the Program Suppliers and Devotional category funds while their motions seeking to dismiss or disqualify the MGC or IPG claims were pending before the Judges. MGC, in contrast, has *no* evidentiary basis to seek disqualification of all of MPAA's and SDC's claims in this proceeding—especially now that the Judges have already ruled on claims challenges and ordered the parties to incorporate the Claims Order into their written direct statements. *See* Claims Order at 58.

Ignoring these blatant violations, MGC argues that the Judges should consider the MGC December 29 Filing a written direct statement because the only two mandatory requirements for a written direct statement set forth in Section 351.4(b) of the Judges' regulations are (1) witness testimony and (2) a claim, and the MGC December 29 Filing included both elements. MGC Opposition at 2. Whether the "testimony" of Raul Galaz attached to the MGC December 29 Filing or MGC's bogus 100% claims actually satisfied Section 351.4(b)(1) remains debatable. However, even if the Judges were to find that the MGC December 29 Filing satisfied Section 351.4(b) of the regulations, the MGC December 29 Filing was still deficient, and not a timely and compliant written direct statement, because it failed to satisfy the subscription requirements for all pleadings set forth in Section 350.6(e)(3), and failed to incorporate the Claims Order. MGC cannot pick and choose which of the Judges' regulations it will comply with at any given point in a proceeding—it remains obligated to comply with *all* the Judges regulations at all times. *See Order*, Docket Nos. 2001-8 CARP CD 98-99, *et al.*, at 5 (June 26, 2006) ("June 26, 2006 Order") ("Parties are bound by the regulations and may not vary from their requirements unless allowed to do so by the Office."). Likewise, MGC must comply with all of the Judges'

Orders in this proceeding, including the Claims Order. MGC failed to do so in the MGC December 29 Filing. As a result, the filing should be stricken, with prejudice.

II. MGC Failed To Submit A Methodology As Part Of Its Written Direct Statement And Its Purported Acceptance of MPAA and SDC Methodologies Is A Sham.

MGC admits that it failed to articulate a MGC methodology in the MGC December 29 Filing—indeed, MGC said so expressly in the filing itself. *See* MGC December 29 Filing, Testimony of Raul Galaz at 3 (“As regards the distribution of 2010-2013 cable and satellite royalties, Multigroup Claimants submits no sponsored distribution methodology.”).

As MPAA and SDC explained in the Joint Motion, the Judges’ August 11, 2017 *Order Granting In Part Allocation Phase Parties’ Motion To Dismiss Multigroup Claimants And Denying Multigroup Claimants’ Motion For Sanctions Against Allocation Phase Parties* (“August 11 Order”) makes it clear that all parties are required to submit a methodology as a part of their written direct statements, and that “[f]ailing to do so is inimical to a party’s continued participation” in that phase of the proceeding. *See* August 11 Order at 3. MGC argues that this ruling applies only to the Allocation Phase of this proceeding, and not the Distribution Phase, suggesting that there are different standards for what parties must include in a written direct statement in different phases of this proceeding. MGC Opposition at 11-12. However, MGC is wrong.

The Judges’ regulations do not provide different requirements for written direct statements (or any other pleadings) filed in the Allocation or Distribution Phase of royalty distribution proceedings. *See* 37 C.F.R. §§ 351.4, 350.6(e)(3). Rather, the Judges’ regulations make it clear that the requirements for filings remain consistent, regardless of the phase of the proceeding in which a participant finds himself. Moreover, the Judges already made it clear that their decision to consolidate the Allocation and Distribution Phases of this proceeding under the

same docket number has no impact on the Judges' regulations, orders, or the precedents governing royalty distribution proceedings, and that the Judges did not intend to waive any of those requirements. *See* August 11 Order at 3. Accordingly, MGC's failure to include a methodology in the MGC December 29 Filing remains contrary to the August 11 Order in this proceeding, and thus renders it deficient as a written direct statement.

Clearly cognizant of this deficiency, MGC argues repeatedly in the MGC Opposition that it should not be required to submit a MGC methodology as a part of its written direct statement *at all*, and instead should be permitted to "work from" the methodologies presented by MPAA and SDC and present a yet-to-be-disclosed methodology that modifies or adjusts the MPAA and/or SDC methodologies as a part of its written rebuttal statement. *See* MGC Opposition at 9 (indicating that MGC's acceptance of its adversaries' methodologies is "subject...to modifications as to the reasonableness of such methodology and other evidence submitted in the rebuttal phase of proceedings") and 13 (arguing that "a party may logically argue [in rebuttal] that a methodology is failing in a particular manner, then argue for the adjustment that would remedy such error.").

However, as MPAA and SDC explained in the Joint Motion, the Judges have already ruled that it is impermissible for a party to submit a modification or adjustment of another party's methodology for the first time as a part of its rebuttal case. *See* Joint Motion at 7-8 (discussing the Judges' rejection of the so-called Robinson-Gray methodology in the 2004-2009 Cable and 1999-2009 Satellite Phase II proceeding); *see also* Docket No. 2012-6 CRB CD (2004-2009) (Phase II) and 2012-7 CRB SD (1999-2009) (Phase II), April 16, 2015 Tr. at 165-67 (Barnett, C.J.). The Judges should reject MGC's attempts to game the system once again in this proceeding and strike the MGC December 29 Filing with prejudice.

III. MGC Should Be Dismissed From The Distribution Phase Of This Proceeding.

As explained in the Joint Motion, MGC's failure to submit a timely and compliant Distribution Phase written direct statement places it in procedural default, and makes MGC subject to automatic dismissal from the Distribution Phase of this proceeding. *See* Joint Motion at 8-9. Moreover, the Judges clearly have authority to dismiss a participant from royalty distribution proceedings as a sanction for procedural violations. *See* Joint Motion at 9-10; *see also* 17 U.S.C. § 801(c); June 26, 2006 Order at 6. MGC has offered no credible argument explaining why the Judges should not find MGC in procedural default, and has not even attempted to excuse the repeated procedural violations by MGC and its predecessor (and real party in interest), IPG, in this and other royalty distribution proceedings. MPAA and SDC urge the Judges once again to decisively and swiftly exercise their authority under the Copyright Act and precedent, and enter an order dismissing MGC from the Distribution Phase of these proceedings.

IV. CONCLUSION

For the foregoing reasons, the Judges should grant the Joint Motion, strike MGC's purported written direct statement with prejudice, and dismiss MGC as a participant in the Distribution Phase of this consolidated proceeding.

Respectfully submitted,

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